

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA**

DAVID KAPPELUSCH,)	
)	
Plaintiff,)	
)	
v.)	Case No. 1:23-CV-226
)	
MICHAEL SCHNELL, et al.,)	
)	
Defendants.)	

MEMORANDUM ORDER

This action was received by the Clerk of Court on August 3, 2023. The matter was assigned and referred to Chief United States Magistrate Judge Richard A. Lanzillo, for a report and recommendation in accordance with the Magistrate Judges Act, 28 U.S.C. § 636(b)(1), and Rules 72.1.3 and 72.1.4 of the Local Rules of this Court pertaining to Magistrate Judges.

In February of 2023, Plaintiff David Kappelusch (“Kappelusch”) was a pretrial detainee at the Venango County Pennsylvania Prison. Kappelusch’s Amended Complaint (ECF No. 23), which is the operative pleading herein, raises the following: (1) claims of excessive force under the Fourteenth Amendment against Defendants Bishop, Westerburg, and Scannell, stemming from multiple instances of force, and (2) a conditions of confinement claim, also under the Fourteenth Amendment, against the same Defendants. The Defendants, interpreting the Amended Complaint in a similar manner, have moved to dismiss these claims. *See* ECF No. 29.

On December 5, 2024, Chief Magistrate Judge Lanzillo issued a Report and Recommendation recommending that the Defendants’ motion be granted in part and denied in part. Specifically, Judge Lanzillo’s Report recommended the Court grant the motion as to Kappelusch’s conspiracy claim and all claims against Defendant Bishop and that these claims be

dismissed without prejudice and with leave to amend. In all other respects, Judge Lanzillo recommended that the motion be denied and that the following claims proceed in the litigation:

(1) Kappelusch's excessive force claims against Defendants Scannell and Westerburg, (2) Kappelusch's conditions of confinement claim against Defendants Scannell and Westerburg, and (3) his retaliation claim against Scannell. To date, neither Kappelusch nor the Defendants filed Objections to these recommendations and the time for doing so has now passed. The Court therefore considers the unchallenged Report and Recommendation only for clear error or manifest injustice. *See Smith v. Pennsylvania State Police*, 2023 WL 3198210, at *1 (W.D. Pa. May 1, 2023) (citing Fed. R. Civ. P. 72(b)). After carefully considering Chief Judge Lanzillo's Report (ECF No. 43), the Court discerns no clear error or manifest injustice. Accordingly, it is hereby ORDERED as follows:

1. IT IS ORDERED that the Defendants' motion to dismiss [ECF No. 29] is granted in part and denied in part.

2. SPECIFICALLY, IT IS ORDERED that the motion is granted as to Kappelusch's conspiracy claim and all claims other against Warden Bishop. These claims are DISMISSED WITHOUT PREJUDICE and with leave to amend.

3. AND IT IS FURTHER ORDERED that, in all other respects, the Defendants' motion is denied. The following claims shall proceed: (1) Kappelusch's excessive force claims against Scannell and Westerburg, (2) his conditions of confinement claim against Scannell and Westerburg, and (3) his retaliation claim against Scannell.


4. AND IT IS FURTHER ORDERED that Kappelusch file any Second Amended Complaint within twenty-one (21) days from the date of this Order. Amended complaints take the place of the complaint (and prior amended complaints), and therefore must be complete in all

respects. A complete pleading has a proper caption and heading, identifies all parties to the action, addresses jurisdiction and venue, sets forth the material facts, asserts all legal claims, is signed and dated, and if Kappelusch so chooses, is verified. Even claims which have not been dismissed must be realleged. Kappelusch must also attach to a second amended complaint any exhibit he wishes the Court to consider in connection with the allegations of the second amended complaint, including any exhibit(s) attached to a previous complaint.

5. AND IT IS FURTHER ORDERED that, should Kappelusch not file a Second Amended Complaint within twenty-one days, the dismissal of his claims without prejudice will be converted into a dismissal with prejudice without further notice.

6. AND, IT IS FURTHER ORDERED that the Report and Recommendation of Chief Magistrate Judge Lanzillo, issued on December 5, 2024 [ECF No. 41], is adopted as the Opinion of the Court.

Dated: January 10, 2025.


SUSAN PARADISE BAXTER
United States District Judge